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No. 78-1259

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRUCE H. SHREEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-27a) is reported at 395 A. 2d 774. The memorandum opinions of the Superior Court of the District of Columbia (Pet. App. 28a-29a, 30a-34a) are unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 15, 1978. The petition for a writ of certiorari was filed on February 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's questioning by police, undertaken without the presence or consent of his attorney, violated his right to the assistance of counsel.

2. Whether, after his arrest in the District of Columbia for unlawful flight to avoid prosecution on homicide charges in Maryland, petitioner was entitled to a court-ordered independent psychiatric evaluation at the time of his extradition.

3. Whether, in a bifurcated felony trial, alternate jurors were properly substituted for inattentive regular jurors during the insanity phase of the trial.

STATEMENT

Following a bifurcated jury trial in the Superior Court of the District of Columbia, petitioner was convicted of felony murder, in violation of 22 D.C. Code 2401; armed robbery, in violation of 22 D.C. Code 2901 and 3202; and second-degree murder, in violation of 22 D.C. Code 2403. He was sentenced to concurrent terms of 20 years to life imprisonment on the felony murder count, 15 years to life on the armed robbery count, and 15 years to life on the second-degree murder count, all to be served consecutively to state sentences previously imposed. The District of Columbia Court of Appeals affirmed in a comprehensive opinion (Pet. App. 1a-27a).

1. The evidence presented at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-10a). Briefly, it showed that on January 26, 1973, petitioner and an accomplice robbed and killed Charles Myles in the District of Columbia. The following day, petitioner committed several additional crimes of violence in Maryland, including killing a second individual and shooting a police officer who had stopped petitioner's car to investigate the Maryland offenses. Thereafter, on January 28, Maryland investigators seized certain incriminating items from petitioner's abandoned car (Pet. App. 2a-4a).

FBI agents arrested petitioner in the District of Columbia on February 2, 1973, and charged him with unlawful flight to avoid prosecution on the Maryland homicide charges. He was advised of his *Miranda* rights, after which he executed a written waiver form. He then freely responded to routine questioning, but he refused to discuss the Maryland killings. Petitioner subsequently consented to talk with a detective from the District of Columbia's Metropolitan Police Department, and he admitted to the detective that he had been near the scene of the District of Columbia homicide at the time Myles was killed (Pet. App. 4a-5a).

On February 3, the day after petitioner's arrest, counsel was appointed to represent him in the extradition proceeding. Two days later, Deputy Sheriff Donald Purdy of the St. Mary's County (Maryland) Police Department came to the District in an effort to persuade petitioner to return to Maryland voluntarily. Purdy first approached petitioner's attorney to seek permission to interview petitioner. When contacted by Purdy, the attorney stated that he would advise petitioner not to talk with Purdy, but that petitioner could make his own decision in that regard. Purdy then sought to interview petitioner regarding the Maryland offenses, but petitioner declined to be interviewed at that time. He stated, however, that he would consent to an interview at some later time. On March 7, Purdy returned to the District to interview petitioner. Purdy did not advise petitioner's counsel of the interview,[1] but he twice advised petitioner of his

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[1]At a pretrial suppression hearing, Purdy testified that during his initial contact with petitioner's counsel on February 5, the attorney indicated that his advice would be "that [petitioner] not talk to [Purdy], but if he did, it was on his own * * * it would be up to him * * *" (III Tr. 496). On two or three occasions

Miranda rights, and he told petitioner that if he wanted his attorney to be present, he would be summoned. Petitioner declined Purdy's offer to obtain the presence of his attorney, and he agreed to the interview. He thereafter made a series of admissions regarding his involvement in the Maryland crimes, portions of which were introduced over objection during the insanity phase of petitioner's trial on the District of Columbia charges (Pet. App. 5a-6a).

2. During this period, petitioner's counsel became concerned about petitioner's mental status. He arranged for a clinical psychologist to evaluate petitioner, and when the psychologist's report supported his concerns, counsel moved, in the extradition proceedings, for an independent psychiatric examination of his client. The government opposed the motion, claiming that the court had authority to order such an examination only when an accused was to stand trial in the District of Columbia. Noting that "any trial of this fugitive will be in Maryland," the government argued that an independent psychiatric evaluation relating to an

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between February 5 and March 7, Purdy had similar conversations with counsel concerning petitioner's interrogation (III Tr. 504). According to Purdy, the attorney informed him that any willingness to submit to questioning was petitioner's "prerogative," since he had furnished his client with "the alternative[s] whether he wanted to talk to [Purdy] or not" (III Tr. 507). Purdy further indicated that he had wanted to contact defense counsel "[f]or the reason I wanted to talk with Shreeves, and I figured [the attorney] would like to be present" (III Tr. 497), and if he had sensed that the attorney deemed it "important" that he attend any interrogation, "I would have been certain that [the attorney was] there" (III Tr. 505-506). The attorney's recollection of his discussion with Purdy was unclear. However, he testified that this was the type of case in which it would have been his practice to advise his client not to respond to police inquiries; he noted that the "last decision" was his client's, and that if his client wanted to talk to the police, the attorney would "certainly want to be there" (IV Tr. 1013, 1016-1017).

insanity defense would serve no purpose at that time. The court denied the defense motion and on March 14 ordered that petitioner be surrendered to Maryland authorities. Following his extradition to Maryland, petitioner underwent psychiatric testing relating to the homicide charges in that State. On April 4, 1973, petitioner was indicted in the District of Columbia for the Myles murder (Pet. App. 7a).

In light of petitioner's notice of intent to raise an insanity defense, the Superior Court of the District of Columbia on August 1, 1973, ordered his commitment to St. Elizabeth's Hospital for mental examination. Because he was being held in Maryland to defend against charges in that jurisdiction, however, petitioner was not admitted to St. Elizabeth's for testing until October 1973. The results of the testing done at that time were subsequently introduced at petitioner's trial (Pet. App. 7a-8a).

3. A bifurcated trial was held. At the conclusion of the merits phase of the trial, the jury returned a verdict of guilty on all counts. The insanity phase of the trial began almost four months later. At the close of the evidence in that phase, and before the jury began its deliberations on the question of insanity, the court discharged one of the jurors because of repeated inattentiveness at trial. The defense objected but then moved for the removal of another juror, also for inattentiveness. The two jurors were replaced by alternate jurors, who had heard all of the evidence presented during both phases of the trial. Following its deliberations, the jury found that petitioner had failed to establish the defense of insanity (Pet. App. 9a-10a).

ARGUMENT

1. Petitioner first contends (Pet. 8-10) that he was improperly denied an independent psychiatric evaluation at the time of the extradition hearing on the

Maryland offenses. This denial, he claims, was based upon the government's erroneous representations that because petitioner faced only Maryland charges, the court lacked authority to order the requested mental examination.

Entitlement to a court-ordered pretrial competency examination in the District of Columbia only attaches upon arrest or upon being formally charged with an offense. 24 D.C. Code 301(a)(1). Since at the time of the interstate extradition hearing petitioner was an interstate fugitive and not yet charged with an offense in the District, there was no issue regarding either his competency for trial or his responsibility for the Myles murder then before the District of Columbia court. Rather, the issues for determination by that court were whether the person demanded was shown to be charged with a crime and whether he was a fugitive. 23 D.C. Code 704; *United States* v. *Green*, 499 F. 2d 538, 540-541 (D.C. Cir. 1974); *Moncrief* v. *Anderson*, 342 F. 2d 902, 904 (D.C. Cir. 1964); see *Hyatt* v. *People of State of New York ex rel. Corkran*, 188 U.S. 691 (1903). In light of the narrow issue before the court in that proceeding, there was no basis for the court to order an examination to probe defenses that petitioner might raise if he were subsequently to be prosecuted on charges in the District of Columbia. See *Lathan* v. *Reid*, 280 F. 2d 66, 69 (D.C. Cir.), cert. denied, 364 U.S. 865 (1960); cf. *United States* v. *Perkins*, 433 F. 2d 1182 (D.C. Cir. 1970).

The premise for petitioner's argument (Pet. 8) is that the government affirmatively misled the court by failing to disclose that he was a potential defendant in the District of Columbia. But the grand jury considering the Myles homicide had not yet returned an indictment, and it continued to take testimony weeks after petitioner had been extradited to Maryland (Pet. App. 16a-17a). There is no constitutional or

statutory mandate that charges be filed as soon as probable cause exists, or even after there is sufficient evidence to establish a suspect's guilt beyond a reasonable doubt, but before an investigation is complete. *United States* v. *Lovasco*, 431 U.S. 783, 792-794 (1977). In light of these facts, the court of appeals properly upheld the trial court's finding that the government was making a good faith effort during this period to present an appropriate case to the grand jury and that it "was not attempting to gain a tactical advantage by delaying [petitioner's] indictment to prevent an immediate mental examination" (Pet. App. 16a-17a).

Petitioner further argues (Pet. 9) that his insanity defense was prejudiced when, because of the denial of his request at the extradition hearing for an independent psychiatric evaluation, he was forced to rely upon the testimony of the clinical psychologist who had examined petitioner shortly after his arrest. As the court of appeals noted (Pet. App. 17a), there is no merit to petitioner's claim of prejudice. Shortly after petitioner was transferred to the Maryland authorities, he underwent a psychiatric examination in that State, the results of which were available to petitioner in his District of Columbia trial. The claim of prejudice is even less compelling in light of the testimony of the psychologist who examined petitioner shortly after his arrest, who stated that he "didn't think that he was psychotic on that date" (XIX Tr. 109).

2. Petitioner next contends (Pet. 10-14) that he was denied his Sixth Amendment right to counsel when he was interrogated by Deputy Sheriff Purdy without the presence or permission of the attorney who had been appointed for him in connection with the extradition proceedings.

Petitioner correctly notes (Pet. 10-12) that there has been a divergence of opinion among the various federal and state appellate courts regarding the validity of a suspect's waiver of the right to the presence of an attorney during interrogation after he has obtained representation. Nonetheless, this Court's recent decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), and subsequent decisions of various courts of appeals support the view of the court below (Pet. App. 11a-12a) that in appropriate circumstances an accused may validly waive the right to counsel without consulting his attorney.

In *Brewer* v. *Williams*, *supra*, this Court held that the defendant did not waive his right to counsel, but it expressly noted that it did not mean to suggest that the defendant could not have waived his right to counsel without notice to his attorney. 430 U.S. at 405-406. In his concurring opinion, Mr. Justice Powell interpreted the majority opinion as acknowledging that a represented defendant may waive his right to the assistance of counsel: "[T]he opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel." 430 U.S. at 413. The four dissenters concluded that the defendant could—and did—waive his right to counsel. See 430 U.S. at 417 (Burger, C.J., dissenting); *id.* at 433-437 (White, J., dissenting).

The decisions of the courts of appeals since *Brewer* have uniformly refused to find that communications between law enforcement authorities and represented criminal defendants without prior notice to counsel is *per se* violative of the Fifth or Sixth Amendments See, *e.g.*, *United States* v. *Brown*, 569 F. 2d 236 (5th Cir. 1978) (en banc); *United States* v. *Rodriguez-Gastelum*, 569 F. 2d 482 (9th Cir. 1978) (en banc); *United States* v. *Monti*, 557 F. 2d 899 (1st Cir. 1977). Accordingly,

there is no occasion for this Court to resolve the divergent views taken by the various federal and state appellate courts prior to *Brewer* v. *Williams*. Rather, it can reasonably be expected that this conflict will dissipate in light of the view of a majority of the Justices in *Brewer* that in appropriate circumstances, the right to the assistance of counsel may be waived without the presence or permission of counsel.

Unlike *Brewer*, where the incriminating statement itself was the only affirmative act of the defendant that could be advanced to rebut the initial presumption against waiver of counsel, the circumstances in this case clearly establish that petitioner knowingly relinquished that right. Petitioner expressly waived his attorney's presence after twice receiving *Miranda* warnings, and he declined Purdy's offer to summon counsel to the interview. Moreover, petitioner never stated that he wished to consult with his attorney before making statements to the officer.[2] Petitioner's

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[2]There is also questionable basis for petitioner's assertion (Pet. 14) that Purdy circumvented defense counsel's instructions regarding interrogation without his presence. The officer testified that he had contacted counsel "[f]or the reason I wanted to talk to Shreeves, and I figured [the attorney] would like to be present" (III Tr. 497). He further testified that he had interviewed petitioner only after petitioner's counsel had told him that whether to be interviewed or not was the defendant's "prerogative" (III Tr. 507). The defense attorney's recollection as to whether he forbade Purdy from speaking to his client alone was unclear and was predicated on his belief that it would have been his customary practice to attend an interrogation in a case where plea bargaining was not a viable alternative (IV Tr. 1013). Purdy had given counsel explicit and repeated notice that he intended to interview petitioner, and counsel's response to Purdy was couched in terms of petitioner's making the "last decision" (IV Tr. 1013-1017). It is therefore reasonable to conclude, as did the court below (Pet. App. 14a n.10), that the attorney left Purdy with the impression that the option was his client's whether to respond to the officer's questioning.

desire to discuss details of the crimes under investigation with Purdy (although not with a reporter accompanying him) was indicative, the trial court properly ruled, that petitioner understood his rights and intentionally waived them (VII Tr. 1171-1172).[3]

3. Finally, petitioner claims (Pet. 14-16) that the trial court erred in excusing two jurors prior to deliberations in the insanity phase of the trial. The procedure, petitioner contends, violated the provision of Rule 24(c) of the D.C. Superior Court Criminal Rules governing discharge of alternate jurors and was tantamount to a denial of his Sixth Amendment right to trial by jury. Because this issue is one of first impression and because it was correctly decided by the court of appeals, review by this Court is unwarranted.

A trial court, in its sound discretion, has the authority under Fed. R. Crim. P. 24(c) to remove a juror and substitute an alternate if a juror is found to be "unable or disqualified to perform [his] duties." See *United States* v. *Jones*, 534 F. 2d 1344 (9th Cir.), cert. denied, 429 U.S. 840 (1976); *United States* v. *Floyd*, 496 F. 2d 982 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); *United States* v. *Hoffa*, 369 F. 2d 698 (7th Cir. (1966), rev'd on other grounds, 387 U.S. 231 (1967). This is especially true when the release and replacement of a juror for inattentiveness is necessary in order to assure a fair trial. *United States* v. *Cohen*, 530 F. 2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Cameron*, 464 F. 2d 333 (3d Cir. 1972).

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[3]The present case is factually dissimilar to *Massiah* v. *United States*, 377 U.S. 201 (1964), where surreptitious means were employed to elicit the inculpatory statements and admissions. *Massiah* did not address the issue of waiver at all, since it involved an unwary defendant having had no opportunity to make an informed decision regarding his right to counsel.

Petitioner discusses at some length (Pet. 16-21) the established principle under Fed. R. Crim. P. 24(c) that alternate jurors ordinarily should not be substituted for original jurors after deliberations have commenced. The cases upon which petitioner relies, however, do not control this case; they address the ordinary situation of a unitary trial, not a bifurcated trial containing an insanity issue. Petitioner's submission, in essence, is that alternate jurors may never be used during the insanity phase of a bifurcated trial when they did not participate in the deliberations on the merits phase.

Rule 24(c) indicates that, until the jurors retire to consider the verdict, the alternates remain on an equal footing with them. The rule makes it clear that the responsibilities of the regular and alternate jury members are coextensive; they have "the same functions, powers, facilities and privileges." Therefore, when jurors are empanelled in a bifurcated trial, their public duty is not fulfilled until the presentation of evidence is completed. Here, the two parts of petitioner's trial were entirely separate and distinct, and the two sets of deliberations were wholly independent. Petitioner himself acknowledged the separateness of the two phases of the trial when he demanded separate juries to try each phase. Evidence was introduced during each part, and the jury was charged after each part as to the applicable law. The substitution of jurors prior to the deliberations at the end of the second phase of the trial was therefore wholly different from the substitution of alternate jurors during the deliberations in a single-phase trial, or in the midst of the deliberations in one or the other phase of a bifurcated trial.

For this reason, there is no risk in this setting of inherent coercion upon the new jurors to accept the prevailing views among the other jurors. Because the insanity phase of the trial is not simply a continuation

of the first phase but constitutes a separate and distinct phase of the decision-making process, the alternate jurors are not in the position of entering unitary deliberations after the deliberations have begun and the remaining jurors have made progress toward reaching a verdict. Particularly in cases such as this one, where the two phases of the bifurcated trial are held weeks or even months apart, to discharge the alternates at the start of the first set of deliberations would create a grave risk of not having a full jury for the second phase of the trial. Thus, even if the court's construction of Superior Court Criminal Rule 24(c) is deemed applicable to cases involving Fed. R. Crim. P. 24(c), the ruling of the court of appeals on this novel issue was sensible, and it did not encroach on petitioner's right to full and fair consideration by the jury in both phases of his trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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